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# Legal Positivism Social Source Thesis and Metaphysical Grounding: Employing Metaphysical Grounding Based on Metaphysical Laws<sup>2,3</sup>

## 1. Introduction

The main thesis of contemporary legal positivism is the so-called social source thesis (SST). In Scott Shapiro's formulation, it states that "legal facts are ultimately determined by social facts alone"<sup>4</sup>. The SST refers to the relation of determination between legal facts and social facts. And whereas the relation of such relations – legal facts and social facts – have been widely discussed<sup>5</sup>, the former mainly by legal philosophers, the latter by social ontologists, as well as legal philosophers in the legal context, the nature of the *determination* itself remains unclear. Of course, many philosophers of law have attempted to answer how social facts determine the content of law (i.e. legal facts), the most prominent of them being Herbert L.A. Hart and Scott Shapiro<sup>6</sup>. However, it still remains unclear what the nature of this relation is. It may be a semantic or logical relation, like entailment. It is, however, much more plausible that the proper locus of this determination is in the metaphysical sphere. Shapiro talks of legal and social *facts*, and facts surely belong to the metaphysical sphere. And the philosophy of law in general tries to find what law is, which is by far a metaphysical inquiry.

The determination of legal facts by social facts involves some sort of ontological dependence of legal facts on social facts, which means that legal facts are so-and-so due to social facts. But what sort of ontological dependence exactly is it? It is a question that rarely has been asked directly<sup>7</sup>. Tomasz Gizbert-Studnicki who first directly asked

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<sup>4</sup> S. Shapiro, *Legality*, Cambridge (Mass.) 2011, p. 269.

<sup>5</sup> S. Shapiro, *Legality*...; J. Coleman, *Rules and Social Facts*, "Harvard Journal of Law & Public Policy" 1991/3, pp. 703–725.

<sup>6</sup> H.L.A. Hart, *The Concept of Law*, Oxford 2012.

<sup>7</sup> To my best knowledge, David Plunkett (D. Plunkett, *A Positivist Route for Explaining How Facts Make Law*, "Legal Theory" 2012/2, pp. 139–207), was the first to claim that this relation of determination is something like metaphysical

the question *what* is the nature of the relation of determination from the perspective of analytic metaphysics, proposes three possible answers: reduction, supervenience, and metaphysical grounding<sup>8</sup>. He rejects reduction because it is impossible to reduce normative legal facts to descriptive social facts. He argues that the supervenience account does not deliver sufficient answers since supervenience is just a relation of covariance with no explanatory force. Gizbert-Studnicki opts for the grounding account: legal facts are metaphysically grounded in social facts.

In this paper, I would like to examine the grounding account of the determination of the relation between social facts and legal facts, as well as try to resolve some problems that this account involves. The first one is its unintelligibility: if one claims that legal facts are metaphysically grounded in social facts without explaining why this relation holds, such a claim does not seem to be explanatory sufficient. The second one is insufficient explanation of how normative legal facts can be grounded in descriptive social facts.

In the first part of this paper, I will sketch what legal positivists mean by the SST with reference to both exclusive and inclusive legal positivism. Secondly, I will present the notion of metaphysical grounding, which is a metaphysical explanatory relation involving ontological priority and strong ontological dependence. Then, I will present the debate between proponents of grounding on the question of the explanation of why grounding holds, wherein the first answer is that it is a primitive notion, the second refers to essences of facts, and the third refers to metaphysical laws. Thirdly, I will examine the current application of metaphysical grounding in the SST that assumes a primitive notion of grounding and present its drawbacks. Next, I will propose a new formulation of the claim that legal facts are metaphysically grounded in social facts, which will be based on the view that grounding relations are backed by metaphysical laws. I will argue that instrumental rationality is metaphysical law backing a grounding relation between social and legal facts. Lastly, I will provide an assessment of that proposition, claiming that the notion of SST based on grounding that holds due to instrumental rationality as a metaphysical law backing this grounding relation between legal and social facts is intelligible, capable of explaining normative character of legal facts, and, mostly, close to a general form of explanation, including explanation in natural sciences.

## 2. Social source thesis

Legal positivism is defined by the SST. Shapiro's proposition is short but very informative and holds that "Legal facts are ultimately determined by social facts alone"<sup>9</sup>.

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grounding when he argued against Mark Greenberg's (M. Greenberg, *How Facts Make Law*, "Legal Theory" 2004/3, pp. 157–198) view that moral facts are necessary in understanding the practice of law and, in particular the legal relevance of some social facts. However, Plunkett did not take advantage of metaphysical grounding; rather, he simply found that what himself and Greenberg were discussing in legal theory is very similar to the general analytic metaphysics debate on metaphysical grounding. Outside legal positivism and direct reference to SST, Bartosz Brożek in his naturalised project proposes that law supervenes on social regularities and mental states (B. Brożek, *Normatywność Prawa* [Eng. *The Normativity of Law*], Warszawa 2012) and Wojciech Załuski claims that law is an emergent entity supervening on evolutionary meant human tendency to cooperate (W. Załuski, *Evolutionary Theory and Legal Philosophy*, Cheltenham 2009).

<sup>8</sup> T. Gizbert-Studnicki, *Metafizyka pozytywizmu prawniczego* [Eng. *Metaphysics of legal positivism*], "Principia" 2015/61–62, pp. 19–40; T. Gizbert-Studnicki, *The Social Sources Thesis, Metaphysics and Metaphilosophy*, in: P. Banas, A. Dyrda, T. Gizbert-Studnicki, (eds.), *Metaphilosophy of Law*, Oxford–Portland 2016, pp. 121–146.

<sup>9</sup> S. Shapiro, *Legality*..., p. 269.

For Shapiro, his formulation is able to include both inclusive and exclusive legal positivism. For an inclusivist, moral facts may sometimes determine legal facts; it is, however, a contingent feature of a particular legal system in which the rule of recognition refers to moral facts<sup>10</sup>. And since the rule of recognition, which determines which rules are legal rules, is based solely on social facts, the ultimate determination of legal facts still lies in social facts alone. On the other hand, non-positivists reject this thesis and claim that moral facts also necessarily participate in the determination of legal facts.

By legal facts, I simply mean facts about the content of a legal system, e.g. it is a legal fact of the Polish law that one is allowed to buy alcohol when she is at least 18. Every legal norm can be easily transformed into a legal fact. The legal norm of the Polish legal system that “one is allowed to buy alcohol when one is at least 18” can be transformed into the legal fact of the Polish legal system that one is allowed to buy alcohol when she is at least 18. Social facts are facts about people’s attitudes, behaviours, thoughts, etc. It is a social fact the drivers usually stop when the traffic light turns red, and it is a social fact that people generally think that wrong acts should be punished. In turn, moral facts are facts about the moral properties certain objects possess and the relations in which moral properties stand<sup>11</sup>. One may claim that it is a moral fact that slavery is wrong. Moral facts are normative facts; social facts are descriptive facts. I believe that legal facts are normative as well. Two kinds of normativity can be distinguished: weak and strong<sup>12</sup>. If a fact is normative in the weak sense, it is just related to a norm. If a fact is normative in the strong sense, it encompasses reasons for action. Since legal facts are able to guide one’s conduct and can be used in the assessment of someone’s behaviour, I believe they have reason-giving force; therefore, they are normative in the strong sense.

### 3. Metaphysical grounding

Metaphysical grounding (which I sometimes refer to simply as “grounding”) is a vividly discussed relation of the XXI century analytic metaphysics. It is a non-causal metaphysical relation holding between facts (or objects<sup>13</sup>) where a grounded fact holds due to a grounding fact. Grounding provides explanation of why a grounded fact holds: it holds because of a grounding fact. Therefore, a proposition that “mental facts hold in virtue of neuro-physical facts” means that neuro-physical facts ground mental facts, and the former explain the existence of the latter. In a grounding relation, the facts that are among the grounds are called “grounding facts”, whereas the facts that they ground are called “grounded facts”.

Jonathan Schaffer succinctly describes grounding via its similarity to causation. He writes that “Grounding is something like metaphysical causation. Just as causation links the world across time, grounding links the world across levels”<sup>14</sup>.

Such a characteristic assumes a multi-layer structure of the universe. There are many levels of reality, and facts on a higher level are grounded in facts existing on a lower one. For

<sup>10</sup> I use the term “moral fact” without associating it with moral realism. Moral facts are simply facts about the content of morality independent of one’s metaethical position. Therefore, one can operate by the term “moral fact” even if she is a proponent of inclusive legal positivism who opposes moral realism.

<sup>11</sup> G. Rosen, *What is a Moral Law?*, in: R. Shaffer-Landau (ed.), *Oxford Studies in Metaethics*, Vol. 12, Oxford 2017, p. 135.

<sup>12</sup> S. Finlay, *Recent Work on Normativity*, “Analysis” 2010/2, p. 332.

<sup>13</sup> J. Schaffer, *Monism: The Priority of the Whole*, “Philosophical Review” 2010/1, pp. 31–76.

<sup>14</sup> J. Schaffer, *Grounding, Transitivity and Contradictivity*, in: F. Correia, B. Schnieder (eds.), *Grounding: Understanding the Structure of Reality*, Cambridge 2012, p. 122.

instance, if it is the case that mental facts are grounded in neuro-physical facts, the former exist on a higher level of reality than the latter and are irreducible to them. From a logical point of view, the relation of metaphysical grounding is irreflexive (A never grounds itself), asymmetric (if A grounds B, B never grounds A), and transitive (if A grounds B and B grounds C, it means that A grounds C)<sup>15</sup>. These logical properties involve strong metaphysical consequences: in a grounding relation, the grounding fact is ontologically prior to the grounded fact. Moreover, if a fact is grounded in another fact, there is no grounding relation in the opposite direction and, consequently, explanation goes only in one way. Transitivity is able to provide a chain of grounding relations and explanations referring to deeper levels of the universe. If it is the case that biological facts are grounded in chemical facts and chemical facts are grounded in physical facts, it entails that physical facts ground biological facts. Thus, biological facts hold in virtue of physical facts.

Grounding provides metaphysical explanation: if A holds in virtue of B, it means that B explains why A holds. If one wonders about the foundations of A, one can refer to the fact that B is grounded in A in order to explain the holding of A. Logical properties of grounding – irreflexivity, asymmetry, and transitivity – are properties that explanation has as well.

Grounding involves necessity. As Fabrice Correia puts it, “Necessarily, if the fact that A is grounded in some given facts, then it is impossible that the latter facts all exist but fail to ground the fact that A”<sup>16</sup>. In other words, when a particular grounding relation holds and the grounding fact holds, it is necessary that the grounded fact hold as well. Grounding does not mean that it is necessary that the grounding fact obtain, nor that it is necessary that the grounded fact obtain independently of the grounding relation and the grounding fact. For instance, if it is true that mental facts are grounded in neuro-physical facts and neuro-physical facts obtain, it is necessary that mental facts obtain as well.

Two distinctions made by Kit Fine are important. The first is the distinction between full and partial grounding. While A and B both fully ground C, A partly grounds C and B partly grounds C. Obviously, a fact may have many grounding facts. The second is a distinction on mediate and immediate grounding. Immediate grounding is a grounding relation that is not mediated by other grounding relation. Fine describes it as follows:

The statement that  $A \wedge (B \wedge C)$  is mediately grounded in the statements that A, B, C, since the grounding must be seen to be mediated through B, C grounding ( $B \wedge C$ ) and A, ( $B \wedge C$ ) grounding  $A \wedge (B \wedge C)$ . The statements B, C, by contrast, immediately ground  $B \wedge C$ , since the grounding in this case is not mediated through other relationships of ground<sup>17</sup>.

However, a fundamental question remains unanswered: what is the nature of metaphysical grounding? What is the justification or explanation of the fact that grounding holds? Is there not something unintelligible when one claims that mental facts are grounded in neuro-physical facts without any further illumination of this metaphysical relation?

In the theory of metaphysical grounding there are three answers to that question: 1) metaphysical grounding is primitive and it cannot be further analysed; 2) metaphysical grounding holds due to the relation between the essences of grounding and grounded facts; and 3) metaphysical grounding holds on the basis of metaphysical laws.

<sup>15</sup> I use A as “the fact that A”; the same goes for B and C.

<sup>16</sup> F. Correia, *Existential Dependence and Cognate Notions*, Munich 2005, p. 61.

<sup>17</sup> K. Fine, *Guide to Ground*, in: F. Correia, B. Schnieder (eds.), *Grounding...*, p. 50.

### 3.1. Grounding is primitive

The first option claiming that grounding is primitive seems to be the very first answer given by the proponents of grounding<sup>18</sup>. In his seminal paper, which opened the discussion on metaphysical grounding, Fine claims the following:

[T]here is a primitive metaphysical concept of reality, one that cannot be understood in fundamentally different terms; and second, that questions of what is real are to be settled upon the basis of considerations of *ground*<sup>19</sup>.

For Fine, metaphysical grounding enables us to understand what is real. And while reality is primitive, the same goes for grounding, which expresses relations between real facts. This can also be seen in Fine's definition of metaphysical grounding:

I recommend that a statement of ground be cast in the following "canonical" form:

Its being the case that *S* consists in nothing more than its being the case that *T*, *U*, ...<sup>20</sup>.

If a grounded fact consists in nothing more than the grounded fact, it means that if it is the case that *A* grounds *B*, *B* holds simply due to *A* that grounds it. There is nothing more to be said.

Ricki Bliss and Kelly Trogdon claim that the primitive nature of grounding prevails among its proponents:

The more or less received view among proponents of grounding, however, is that the concept isn't analysable – the concept of grounding is ultimately primitive in nature [...], it's important to keep in mind that this doesn't mean that talk of grounding is obscure, or that grounding claims are confused or unjustified. It seems that many notions central to philosophy are unitary and unanalyzable (consider synchronic identity, for example), yet this leads few to dismiss them as obscure, confused, or unjustified<sup>21</sup>.

For those who regard grounding as primitive there is nothing undermining its clear and well-founded basis. There are many philosophical concepts that are highly unlikely to be defined in terms of other concepts, and no one denies their intelligibility.

There is one important argument for the primitive nature of metaphysical grounding. There is a strong, quite widely shared intuition that higher-level facts, like mental facts or normative facts, hold due to some lower-level facts, natural facts, like biological or physical facts. Similarly, higher-level natural facts (probably) hold due to lower-level natural facts, e.g. biological facts hold in virtue of chemical facts (although the current state of science cannot prove it). This chain stops somewhere, perhaps on a quantum level or yet-unknown but postulated level below the quantum level, like the string level. And our explanation of those dependencies needs to stop somewhere as well. For that reason, metaphysical grounding, being a metaphysical relation explaining the holding of one fact in virtue of another, is postulated to be such a primitive and ultimate metaphysical explanatory relation in order to avoid *regress ad infinitum* in our explanation.

<sup>18</sup> K. Fine, *Guide...*; J. Schaffer, *On What Grounds What*, in: D. Manley, D. Chalmers, R. Wasserman (eds.), *New Essays on the Foundations of Ontology*, Oxford 2009, pp. 347–383; G. Rosen, *Metaphysical Dependence: Grounding and Reduction*, in: B. Hale, A. Hoffmann (eds.), *Modality: Metaphysics, Logic, and Epistemology*, Oxford 2010, pp. 109–135.

<sup>19</sup> K. Fine, *The Question of Realism*, "Philosophers' Imprint" 2001/1, p. 1.

<sup>20</sup> K. Fine, *The Question...*, p. 15.

<sup>21</sup> R. Bliss, K. Trogdon, *Metaphysical Grounding*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* 2016, <https://plato.stanford.edu/entries/grounding>, accessed on: 20.06.2019.

### 3.2. Grounding holds due to essences

The view that grounding holds due to relations between essences of facts is proposed by Fine in his later writings, as well as by Gideon Rosen and Shamik Dasgupta<sup>22</sup>. For Fine, the essence of an object or property is the propositions that define it<sup>23</sup>. He argues that the essence of an object is not identical with its necessary properties – a property may be necessary for an object, yet still it does not have to make this object into that which it actually is<sup>24</sup>. For example, it is a necessary property of Socrates that he is the sole member of a unit set {Socrates}, but it is counterintuitive to say that this is an essential property of Socrates<sup>25</sup>. It is not being the sole member of a set {Socrates} that makes Socrates Socrates.

Once we know what the essence of a given thing is, we can understand what the claim that grounding holds due to essences means. Rosen gives the following example: “Every triangle has three angles. Why? Because it lies in the *nature* of a triangle to have three angles. *Part of what it is* to be a triangle is to have three angles”<sup>26</sup>. For Rosen, the concept of nature is identical to the concept of essence. It is important that, for Fine and Rosen, essences explain general grounding facts – they explain why grounding holds as a general relation. For them, metaphysical grounding holds because the essence of a grounding fact (like having three angles being the essence of a triangle) makes a grounding fact occur (like *x* being a triangle). Since such is the universal form of metaphysical grounding, every particular grounding relation also has such a form. Essentialist views on grounding seem to provide intelligibility that the primitive notion of grounding is lacking.

### 3.3. Grounding holds due to metaphysical laws

The third option is that metaphysical grounding holds due to metaphysical laws. It is proposed in Schaffer’s and Rosen’s recent works<sup>27</sup>. An analysis without strong adherence to this position of explanation of grounding may be found in Stephanie Leary<sup>28</sup>. Schaffer claims: “Just like causal explanation requires laws of nature, so metaphysical explanation requires *laws of metaphysics*”<sup>29</sup>. While grounding is in general a form of metaphysical explanation, in every case there is a particular metaphysical law that makes such an explanation appropriate. This version is strongly influenced by a form of explanation in natural sciences. Boris Kment notices:

[T]here is a far-reaching structural analogy between causation and grounding. Just as earlier states of the universe typically give rise to later ones by causing them, metaphysically more fundamental facts give rise to less fundamental ones by grounding them. Certain general

<sup>22</sup> K. Fine, *Guide...*; G. Rosen, *Metaphysical...*; S. Dasgupta, *On the Plurality of Grounds*, “Philosophers’ Imprint” 2014/14, pp. 1–28.

<sup>23</sup> K. Fine, *Senses of Essence*, in: W. Sinnott-Armstrong, D. Raffman, N. Asher (eds.), *Modality, Morality and Belief. Essays in Honor of Ruth Barcan Marcus*, Cambridge 1995, p. 53–73.

<sup>24</sup> K. Fine, *Essences and Modality*, “Philosophical Perspectives” 1994/8, pp. 1–16.

<sup>25</sup> K. Fine, *Essences...*, p. 8.

<sup>26</sup> G. Rosen, *Metaphysical...*, p. 119.

<sup>27</sup> J. Schaffer, *Laws for Metaphysical Explanation*, “Philosophical Issues” 2017/27, pp. 302–321; G. Rosen, *What is...*

<sup>28</sup> S. Leary, *Non-naturalism and Normative Necessities*, in: R. Shaffer-Landau (ed.), *Oxford Studies in Metaethics*, Vol. 12, Oxford 2017, pp. 76–105.

<sup>29</sup> J. Schaffer, *Laws...*, p. 315.



metaphysical principles, which I will call “laws of metaphysics”, play essentially the same role in grounding as natural laws do in causation<sup>30</sup>.

Schaffer claims that metaphysical laws, which underlie metaphysical explanation, are fundamental: there is no deeper level by which explanation of metaphysical laws would be possible<sup>31</sup>. More technically, Schaffer claims that functions defined in set-theory terms can represent metaphysical laws<sup>32</sup>. He also claims that even if someone accepts the essentialist version of grounding, a connection between essences of grounding and grounded facts is still required, and this connection is a metaphysical law<sup>33</sup>. Therefore, for him, the essentialist conception of grounding must presuppose metaphysical laws, and an essentialist approach can be reduced to a metaphysical laws approach.

Consider the ways of explanation in natural sciences. Scientists discover laws of nature and by reference to them explain why one thing causes another thing. Why did a billiard ball make another billiard ball move? Because of Newton’s second law of motion. Why did a rise in the temperature of gas caused a rise in its tension? Because of the ideal gas law. The fact that a ball moved was caused by its being hit by another ball, as there is Newton’s second law of motion. The rise of gas pressure was caused by a rise of gas temperature due to the ideal gas law. Causal relations between two events are fully explained by a particular law of nature.

Some metaphysicians would like to have a very similar form of explanation in the metaphysical sphere. And just as causality constitutes explanation in natural sciences and is formed by natural laws, metaphysical grounding constitutes metaphysical explanation, which holds due to metaphysical laws. Just like causality is backed by laws of nature, grounding is backed by metaphysical laws.

One clear example of grounding holding due to metaphysical laws may be given in the normative domain. Assume that utilitarianism is true, at least for the purpose of this example. What makes to exist a normative fact that something is good in utilitarianism? That a certain underlying natural fact fulfils the requirement of the utilitarian principle: it gives the greatest amount of happiness to the greatest number of people. This way, a moral, normative fact has been explained with reference to a natural fact. Metaphysically, this normative fact is grounded in a particular natural fact. And this particular grounding relation holds because of the utilitarian principle. Therefore, under the notion of grounding holding due to metaphysical laws, utilitarian principle constitutes a metaphysical law in this particular grounding relation as it backs the grounding relation between normative facts and natural facts.

The reference to the metaphysical law provides the explanation of the grounding relation just like the reference to Newton’s second law of motion provides explanation for one billiard ball’s movement after being hit by another billiard ball.

#### 4. Grounding in positivist theory of law

Gizbert-Studnicki states that the SST should be understood in terms of grounding<sup>34</sup>. The SST claim that legal facts are ultimately *determined* by social facts alone should be

<sup>30</sup> B. Kment, *Modality and Explanatory Reasoning*, Oxford 2014, p. 5.

<sup>31</sup> J. Schaffer, *Laws...*, p. 315.

<sup>32</sup> J. Schaffer, *Laws...*, p. 313.

<sup>33</sup> J. Schaffer, *Laws...*, p. 316.

<sup>34</sup> T. Gizbert-Studnicki, *Metafizyka...*; T. Gizbert-Studnicki, *The Social...*; I refer henceforth to the second work as it is written in English and thus easier to be read by a non-Polish speaker.

understood as the claim that legal facts *are metaphysically grounded in* social facts. As the SST is not a logical, semantic or epistemic thesis, but a metaphysical one, applying a universal explanatory metaphysical relation – metaphysical grounding – seems plausible. As the SST is meant to exclude any other basis of law than social facts, especially moral facts, such a claim implies that legal facts are fully metaphysically grounded in social facts. It means that there are no other facts among their grounds.

Let us recall the way in which grounding is necessary. It means that if a certain kind of social facts occur and it is true that social facts ground legal facts, certain legal facts necessarily occur as well. If certain kind of social facts as facts about regularities in a society and some mental attitude towards those regularities do not occur, legal facts do not occur either. Grounding being necessary fits in perfectly with positivistic views on the origins of law.

The grounding account of determination of legal facts by social facts is also consistent with inclusive legal positivism. As the SST is able to grasp the way in which inclusivists see the foundations of legal facts, so must it do with grounding applications. For an inclusivist, it may happen that the rule of recognition refers to moral facts in determining whether a certain fact is a legal fact. In terms of grounding, it may happen that legal facts are grounded in moral facts, whose legal relevance is in turn grounded in social facts. Mediate grounding is the best formulation of this phenomena: grounding of legal facts in social facts is mediated by moral facts. Still, the ultimate ground of legal facts consists only of social facts. One can also make a reference to the transitivity of metaphysical grounding. As grounding is transitive, eventually, legal facts are grounded in social facts.

There is, however, one problem in the thesis that legal facts are grounded in social facts, which Gizbert-Studnicki is aware of<sup>35</sup>. As legal facts are normative facts and social facts are descriptive facts, how can a normative fact be fully grounded in a descriptive fact?<sup>36</sup> Pekka Vayrynen claims that for a non-normative fact to be able to ground a normative fact, the former must be normatively relevant. But being normatively relevant is to be actually a normative fact<sup>37</sup>. We fall into infinite regress. One of the options discussed by Gizbert-Studnicki is to claim that there is a peculiar normative grounding relation that enables such a grounding of normative facts in descriptive facts. However, Gizbert-Studnicki finds it explanatory weak and mysterious. Greenberg's objection to legal positivism seems to be motivated by this problem: social facts cannot ground legal facts as the rational-relation requirement, which would make this relation intelligible, is not satisfied<sup>38</sup>. Plunkett believes that legal facts can be grounded in social facts with reference to conceptual facts<sup>39</sup>, but I do not see such a proposition as promising. Firstly, conceptual facts seem not to be social facts – to claim that legal facts are grounded also in other kinds of facts may mean that one abandons legal positivism. Secondly, conceptual facts are rather queer metaphysical entities. Therefore, although Plunkett was the first to notice that philosophers of law operate by a concept very similar to the general analytic relation of metaphysical grounding and that the debate between

<sup>35</sup> T. Gizbert-Studnicki, *The Social...*, p. 138.

<sup>36</sup> This applies only to legal facts being normative facts in the strong sense. If one regards legal facts as normative only in the weak sense, the problem of grounding them in descriptive facts would disappear.

<sup>37</sup> P. Vayrynen, *Grounding and Normative Explanation*, "Proceedings of Aristotelian Society" 2013/1, pp. 155–178.

<sup>38</sup> M. Greenberg, *How Facts...*

<sup>39</sup> D. Plunkett, *A Positivist...*



legal positivism and non-positivism actually refers to the facts that ground legal facts, I believe there is a much more promising resolution to this problem.

This account of grounding as determining the relation between social and legal facts is based on a primitive view of grounding. Gizbert-Studnicki explicitly claims that grounding is a primitive concept, but in his opinion, it does not undermine its intelligibility<sup>40</sup>. Under such account, the grounding version of the SST is that legal facts are fully grounded in social facts, and since grounding is primitive, such a relation simply holds, and nothing more can be said. If someone has any doubts about the intelligibility of the above thesis, there is nothing to be said in order to convince her beyond telling the story of legal facts, social facts, and the primitive, ultimate explanatory relation of metaphysical grounding once more. Consider the analogy with billiard balls. If one wonders why a billiard ball moved, I can respond that it moved because another billiard ball hit it. But she can reasonably ask: "OK, but why is it that one ball hitting another makes it move?". If my response is: "It just happens; there is a primitive relation of causality. I'm sorry but that's the most I can tell you", it would be considered a rather poor explanation. I believe the same goes for the intelligibility of the claim that legal facts are grounded in social facts with the application of the primitive concept of grounding.

My claim is that the conception of grounding as a relation based on metaphysical laws is much more plausible and avoids the objection of unintelligibility. In the next part of the paper, I will examine this conception and propose such a particular metaphysical law backing grounding relations between legal facts and social facts.

Before I do that, I would like to present some remarks about not applying essentialist conceptions of grounding. Firstly, it is highly contested whether there is anything like a nature or essence of law<sup>41</sup>. This is clearly noticeable when one adopts Fine's view on essence<sup>42</sup>, that in order to find the essence of legal facts one should not only find necessary features of legal facts, but also find among them those that make legal facts into what they are<sup>43</sup>. Moreover, Schaffer claims that even if one finds the essence of grounding and grounded facts, she still must look for a metaphysical law that makes this connection occur<sup>44</sup>.

For these reasons, although I do not reject completely the possibility of adopting an essentialist conception of grounding to the analysed issue, I prefer to choose another conception of grounding, namely that grounding is based on metaphysical laws, which I found to be much more cogent in application to the issue of grounding relation between social and legal facts.

## 5. Grounding between legal facts and social facts based on a metaphysical law

My thesis is therefore that the best account of the SST is that legal facts are fully grounded in social facts and that this particular grounding holds due to a metaphysical law. I consider grounding based on metaphysical laws as best for providing intelligibility

<sup>40</sup> T. Gizbert-Studnicki, *The Social...*, p. 136.

<sup>41</sup> T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne Dychotomie: krytyka pozytywistycznych teorii prawa* [Eng. *Methodological dichotomies: a critique of positivist legal theories*], Warszawa 2016, pp. 66–71.

<sup>42</sup> K. Fine, *Essence...*

<sup>43</sup> A. Marmor, *Farewell to Conceptual Analysis (in Jurisprudence)*, in: W. Waluchow, S. Sciaraffa (eds.), *Philosophical Foundations of the Nature of Law*, Oxford 2013, pp. 209–229.

<sup>44</sup> J. Schaffer, *Laws...*, pp. 316–317.

to grounding relations. The core issue is, however, what exactly this metaphysical law is in this context.

To begin with, some conditions of searching for such a law must be presented. It must be fundamental. Schaffer describes fundamentality in the following way: "By «fundamental» I mean that there are ungrounded facts about the existence of these entities"<sup>45</sup>. Metaphysical law cannot be justified or explained by reference to other entities. Secondly, in our case of the SST, as legal facts are normative facts and social facts are descriptive facts, it must be a law that connects the descriptive and normative spheres. Thirdly, as legal positivism is a general theory of law, it must be able to explain the existence of legal facts in any actual or possible legal system. It must be universal.

My candidate for the metaphysical law is a norm of instrumental rationality: "in order to achieve an end, adopt suitable means". Consider Shapiro's planning theory of law<sup>46</sup>. He claims that law is a planning activity and he proposes plans and master plans, which are social facts, as a framework explaining legal facts. He is aware of the general problem of normativity of legal facts in legal positivism as he states the following: "On the one hand, legal authority must be conferred by legal norms; yet, on the other, legal norms must be created by legal authority. From these two assumptions, we get a classic chicken-egg paradox"<sup>47</sup>. In order to be able to create legal plans, there must be legal authority. But legal authority holds due to legal norms. And as legal norms are created by legal authority, we fall into a vicious circle<sup>48</sup>. In terms of grounding, legal facts as facts about the content of legal norms are grounded in facts about legal authority. But facts about legal authority are grounded in legal facts. And the application of grounding illuminates the problem as well: if A is grounded in B, B cannot be grounded in A, since grounding is asymmetrical. Shapiro, however, seems to escape from this problem:

Notice that the Planning Theory is able to secure the existence of fundamental legal rules without generating vicious circles or infinite regresses. Legal officials have the power to adopt the shared plan that sets out these fundamental rules by virtue of the norms of instrumental rationality. Since these norms that confer the rational power to plan are not themselves plans, they have not been created by any other authority. They exist simply in virtue of being rationally valid principles<sup>49</sup>.

Firstly, let me consider the metaphysical place of instrumental rationality in legal positivism. As norms of instrumental rationality do not depend in their existence on other entities, vicious circles or infinite regresses do not arise. But consider: the planning activity of legal officials, which is a social fact that makes legal facts emerge, holds by virtue of the norms of instrumental rationality. It seems that the basis of legal facts is constituted both by social facts and norms of instrumental rationality. And instrumental rationality is obviously not a social fact. Does it not stand contrary to the SST's claim that legal facts are grounded *only* in social facts? Vicious circles or infinite regress are avoided, but it is unlikely to be a positivistic theory at all. If instrumental rationality is necessary for legal positivism, it may be argued that the SST is false, but abandoning the SST's results in the rejection of legal positivism. Gizbert-Studnicki, however, opposes such a claim:

<sup>45</sup> J. Schaffer, *Laws...*, p. 315.

<sup>46</sup> S. Shapiro, *Legality...*

<sup>47</sup> S. Shapiro, *Legality...*, p. 179.

<sup>48</sup> T. Gizbert-Studnicki, *The Social...*, p. 139.

<sup>49</sup> S. Shapiro, *Legality...*, p. 181.

I believe, however, this does not force us to abandon the SST. If we look for the facts that ultimately metaphysically determine the law, we find only social facts. Such social facts determine law on the assumption that the norms of practical rationality are valid. The validity of such norms is not a normative fact that contributes to the existence of law but rather a context which must exist, if talking about law is to make sense<sup>50</sup>.

Under such a view, practical rationality (Gizbert-Studnicki's name for instrumental rationality) does not stand along with social facts among facts that ground legal facts, but is rather a broader context or framework making the whole positivistic legal theory possible. I believe that such a thesis reflects the claim that a particular grounding relation holds due to a metaphysical law that backs it. Gizbert-Studnicki could not express it directly in this framework as he is a proponent of a primitive version of grounding, but I think that his analysis of Shapiro's legal positivism is implicitly quite close to the thesis that instrumental rationality constitutes a metaphysical law, which makes positivist grounding claims hold. Moreover, Shapiro himself seems to implicitly regard instrumental rationality as some kind of deeper surface backing the relation of determination between social facts and legal facts. The relation of determination is considered to actually *be* metaphysical grounding. In my view, instrumental rationality in legal positivism has a form of a metaphysical law that backs this grounding relation.

Let us examine the condition that must be set for a metaphysical law to be able to back grounding between legal and social facts. Instrumental rationality is fundamental – it does not hold due to anything else and is not grounded in any other facts<sup>51</sup>. It simply holds just like other basic metaphysical laws hold, e.g. the Aristotelian law of excluded middle. Instrumental rationality connects descriptive and normative spheres: if my aim is Y, I should do X. Y is a descriptive fact; “ought to do” X is a normative fact. It is also universal: it does not exist only in certain cultures or only under the adoption of some other metaphysical propositions.

Instrumental rationality backs the grounding relation between social facts and legal facts and provides legal relevance of social facts. Taking Shapiro's theory, instrumental rationality gives legal officials the ability to create plans. Their attitudes, beliefs, etc. give birth to law. This is possible as norms of instrumental rationality, which are able to explain how an aim of Y can be obtained by X, stand behind. Y is a social fact of attitudes, beliefs, etc., X is a legal fact. In other words, instrumental rationality enables social facts to be the foundation for legal facts. Without instrumental rationality social facts could not generate legal facts. This is why instrumental rationality is a metaphysical law underpinning grounding relation between social and legal facts.

<sup>50</sup> T. Gizbert-Studnicki, *The Social...*, p. 140.

<sup>51</sup> One may prefer to regard instrumental rationality as a conceptual truth. I believe there is no contradiction between seeing it as a conceptual truth and as a metaphysical law. Conceptual truth is a proposition that is true solely on the basis of concepts; linguistic competence is enough to know it, with no relevance of empirical facts. On the other hand, metaphysical law, which is fundamental, is an ultimate form of metaphysical explanation of why certain facts hold. Fundamentality means that metaphysical law does not hold due to other entities. This aspect of being fundamental is quite close to conceptual truths' being true solely on the basis of concepts and not empirical facts. Therefore, it seems that, at least in some cases, there can be a connection between metaphysical laws and conceptual truths, for instance that a metaphysical law expresses a conceptual truth. If instrumental rationality is a conceptual truth, metaphysical law of instrumental rationality expresses this conceptual truth. On the other hand, one should not forget that metaphysical laws has explanatory role of why some facts hold, which is not shared by the conception of conceptual truths. In fact, the concept of conceptual truth belongs to epistemology and in some extent to philosophy of language, whereas the idea of metaphysical laws belongs to metaphysics, so the relation between them is not straightforward and by far needs much more detailed analysis than this short sketch.

Even if Shapiro's version of legal positivism implicitly has the form of the claim that instrumental rationality is a metaphysical law backing a grounding relation between social facts and legal facts, I believe it is true for every version of legal positivism. Let me consider this on the example of the Hartian rule of recognition, one which every legal positivist accepts. I believe that instrumental rationality can explain why the Hartian rule of recognition is metaphysically and legally relevant. Under Hart's version of positivism, instrumental rationality can be seen as providing legal relevance to the rule of recognition (legal officials recognize some rules as legal rules). And it can be explained with reference to norms of instrumental rationality: they want to attain an aim by use of some means. This aim may be, as a general aim of law under legal positivism, a binding solution to some social or moral problems without sliding into moral discourse. And as this aim is achieved, some rules are recognized as legal rules. In such a way, social facts ground a legal fact with instrumental rationality underpinning.

Hence, legal facts are fully grounded in social facts due to instrumental rationality that backs this grounding relation. It follows from Shapiro's thought; he was not able to explicitly express it since the metaphysical debate on grounding was on its starting point at the time when his work was published and the discussion on the basis of metaphysical grounding, including metaphysical laws, had not begun yet. In some sense, Shapiro foresaw the metaphysical method by which legal facts can be explained, but did not possess direct conceptual tools to be able to explicitly formulate it in a metaphysical way. As I have presented it, the thesis that social facts ground legal facts with backing instrumental rationality can be extended to the whole of legal positivism.

One may object to the view that instrumental rationality is a metaphysical law on two possible bases: firstly, there are no metaphysical laws; secondly there are metaphysical laws, but instrumental rationality is not one of them. I believe those possible objections are not sound. Acceptance of the existence of metaphysical laws is one's metaphysical belief and ontological commitment. We differ in metaphysical beliefs, but we can reasonably argue for the existence of such entities like moral facts, non-reductive consciences, and metaphysical relations (grounding being one of them), while some oppose them and prefer more austere metaphysics. Metaphysical claims are notoriously controversial, but some metaphysical framework has to be accepted. One of the many possible arguments for the existence of metaphysical laws is that they are necessary to provide metaphysical explanations in the metaphysical domain in much the same way as natural laws provide scientific explanations in the natural domain. I opt for more metaphysical entities enabling explanation in the metaphysical sphere over austere metaphysics that has fewer ontological commitments, being at the same time incapable of explaining many phenomena.

As for the second basis of objection against instrumental rationality, an opponent might argue that talking about instrumental rationality as a metaphysical law assumes a rational structure of the universe, similar to Stoics' conception of Logos that included both physical and moral laws. For some such a rational structure of the universe may be unacceptable. I find it unsound. Compare this with theoretical views on the nature of logics and mathematics; some argue for constructivism, wherein we construct logical and mathematical principles, some for Platonism, wherein we discover objectively existing principles of logics and mathematics. Logical and mathematical principles are not natural laws, but for a Platonist they constitute what contemporary analytic metaphysics would label as metaphysical laws. Instrumental rationality is not so far from

logical principles, like the law of excluded middle. It is a law of thought and conduct, and if one wants to be rational, she should apply it, just like one who wants to reach correct conclusions should apply logical principles. If one has no problem with accepting universal mathematical truths that can be labelled as metaphysical laws, one should not have problems with accepting instrumental rationality that also can be qualified as metaphysical law.

A careful reader may notice a possible contradiction. Earlier in this paper, in section 2, I claim that legal facts are normative in the strong sense, which means that they have reason-giving force and hold independently of our beliefs. On the other hand, I argue that the relation of metaphysical grounding holding between social and legal facts is backed by the metaphysical law of *instrumental* rationality. But instrumental rationality has rather a weak normative force, since it operates by hypothetical imperative and not by categorical one. In turn, legal facts bind independently of one's aims and desires that could form the first part of hypothetical imperative. It may seem therefore that instrumental rationality, though weaker in normative force, is claimed to be the foundation of legal facts possessing stronger normative force, which may give rise to many doubts. But this is based on a misconception. The normativity of a particular legal fact, like the fact that tax evasion is prohibited in Poland, cannot be understood to be identical with the normativity of legal facts treated as a whole. These legal facts as a whole can be labelled simply as *law* in the most general meaning of this term in the legal context. The aim of this paper is to answer the most fundamental question of why legal facts as a whole exist (or in other words, simply: why law exists). And I believe that the normativity of law as a whole is different from the normativity of particular legal facts. For instance, Shapiro, when analysing normativity of law under his planning theory of law, attributes the existence of normative entities like legal authority, rights and obligations to "highly impersonal shared practices of social planning" that hold on the level of master plan, which regulates the planning activity of planners (officials)<sup>52</sup>. When we bear in mind that for Shapiro planning activity is possible in virtue of the norms of instrumental rationality, it turns out that the source of the normativity of law as a whole lies partly (the other part being the shared social practice of planning) in instrumental rationality, and not in any stronger normative entity that could be formulated by categorical imperative<sup>53</sup>. I share similar views: I believe that that normativity of law as a whole viewed most generally from the metaphysical point of view holds due to our collective aims, plans etc. that can be realized due to instrumental rationality. On the other hand, the normativity of particular legal facts (like that fact that tax evasion is prohibited in Poland) is of a different kind: it holds because a particular legal fact belongs to a legal system and a person's conduct can be assessed by using this legal fact independently of one's beliefs; therefore a legal fact has a reason-giving force and is normative in strong sense<sup>54</sup>. The normativity of legal facts as a whole is different from the normativity of particular legal facts.

<sup>52</sup> S. Shapiro, *Legality*..., p. 182.

<sup>53</sup> It seems that non-positivism would operate by categorical imperative in formulating foundations of law since moral facts are formulated by categorical and not hypothetical imperative.

<sup>54</sup> It should be noticed that for Shapiro legal obligations are not genuine obligations as only moral obligations are genuine obligations, what may be quite curious considering that he is an exclusive positivist. For him, as well as for Joseph Raz, legal obligations have only a necessary claim to authority, which in many cases is not met. For Shapiro, particular legal facts do not possess strong normative force. On the other hand, I believe they do have strong normative force.

Therefore, the SST should be understood as the thesis that legal facts are fully grounded in social facts due to the instrumental rationality that backs this grounding relation. It means that social facts are metaphysically prior to legal facts and make them exist. Social facts are able to explain the existence of legal facts because grounding has explanatory force. And this particular grounding relation holds due to instrumental rationality, which is a metaphysical law that backs this grounding relation. Thanks to that, we avoid the unintelligibility of primitive versions of grounding. If one wonders why social facts actually ground legal facts, the answer is because of the instrumental rationality that backs it. Under primitive notions of grounding, the only possible answer would be “because it simply grounds; grounding is a primitive notion and nothing more can be said”. Recalling the problem of explaining the movement of billiard balls, reference to instrumental rationality in the grounding of legal facts in social facts is like adding “because there is Newton’s second law of motion” in response to questions why one ball caused another ball’s movement.

Moreover, instrumental rationality that backs grounding relations between legal facts and social facts helps explain the normative nature of legal facts without regress: legal facts are normative facts due to fundamental metaphysical laws of instrumental rationality that back their being grounded in descriptive social facts. As instrumental rationality does not stand along with social facts among the grounds of legal facts, it is consistent with positivist theory. And as instrumental rationality is fundamental, the regress of explaining normative facts with reference to other normative facts is avoided. This is another advantage of grounding based on metaphysical laws over primitive notions of grounding in grounding interpretations of the SST.

## 6. Conclusions

Taking advantage of metaphysical grounding holding due to metaphysical laws lacks the drawbacks of primitive notions: unintelligibility and problems with explaining the normative nature of legal facts.

Applying such a version of grounding to a positivist theory of law can provide a wider framework for discussions among legal philosophers. Legal theory can be developed with a strong connection to general analytic metaphysics, which has been developing rapidly for about two decades. Analytic metaphysics can provide many useful tools for legal philosophers and make explanations in theory of law consistent with the general manner of explanation. Using a grounding version that refers to metaphysical laws is a good example since the explanation of legal facts is developed in the same way as the explanation of any kind of metaphysical facts in philosophical investigations. Moreover, it is developed in a very similar way to explanations in the natural sciences, which is considered to be the ideal type of scientific explanation. Causality, which has an explanatory role in the natural sciences, strongly corresponds to metaphysical grounding, which is the metaphysical way of explanation; the counterparts of laws of nature in metaphysics are metaphysical laws.

Application of the notion of metaphysical grounding to the SST can also have other interesting consequences. Since grounding is a transitive relation and social facts do not seem to be fundamental facts (but are likely to be grounded in other kind of facts) those other kind of facts that would ground social facts would also ground legal facts due to the transitive nature of grounding. But this is a question for another paper.



### **Legal Positivism Social Source Thesis and Metaphysical Grounding: Employing Metaphysical Grounding based on Metaphysical Laws**

**Abstract:** The core of legal positivism is the so-called social source thesis, which claims that legal facts are determined only by social facts. I examine an interpretation of this thesis that uses metaphysical grounding as an exact relation between legal facts and social facts. I argue that the current interpretation of the social source thesis in terms of metaphysical grounding has significant drawbacks that stem from it being based on the view that metaphysical grounding is a primitive relation. For that reason, the current interpretation is unintelligible and poses problems with explaining the normativity of legal facts. I present two other views on metaphysical grounding: that it holds due to essences of facts and that it holds due to metaphysical laws. I apply the notion that metaphysical grounding holds due to metaphysical laws and argue that in the case of grounding of legal facts in social facts, this metaphysical law is constituted by instrumental rationality. It provides intelligibility to this grounding relation, is able to explain the normative character of legal facts, and is compatible with the general form of explanation.

**Keywords:** social source thesis, legal facts, metaphysical grounding, metaphysical laws, instrumental rationality

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